FILED
MAY 7 19
CHARLES ELMORE CR
CLE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 933

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

vs.

ABRAHAM I. MENIN, Trustee in Bankruptcy, and PARKE-BERNET GALLERIES, INC.

BRIEF FOR RESPONDENT PARKE-BERNET GALLERIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PARKE-BERNET GALLERIES, INC.,
By J. ARTHUR LEVE,
Counsel.

CORPORATE PRESS, INC., NEW YORK CITY

TABLE OF CONTENTS

PAGE

Report of Opinion 1

Statement 1

Argument 2

Conclusion 3

Cases Cited

Ajax Tool Co., Inc. v. *Buchalter Tool Co., Inc.*, 125 Misc. 752 2

Beauchamp v. *United States*, 76 F. (2d) 663 3

Herring-Hall-Marvin Safe Co. v. *Hall's Safe Co.*, 208 U. S. 554 2

Mutual Life Insurance Co. v. *Menin, et al.*, 115 F. (2d) 975 2

Sawilowsky v. *Brown*, 288 Fed. 533 3

Slater v. *Slater*, 175 N. Y. 143 2

The Metropolitan Telephone and Telegraph Co., et al. v. *Metropolitan Telephone and Telegraph Co.*, 156 App. Div. 577 2

Theobald-Jansen Electric Co. v. *Harry I. Wood Electric Co.*, 285 Fed. 29 2

U. S. Ozone Co. v. *U. S. Ozone Co.*, 62 F. (2d) 881 2

Supreme Court of the United States

OCTOBER TERM, 1940

No.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

vs.

ABRAHAM I. MENIN, Trustee in Bankruptcy, and PARKE-BERNET GALLERIES, INC.

BRIEF OF PARKE-BERNET GALLERIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Report of Opinion.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 115 F. (2d) 975.

Statement.

Petitioner is the pledgee of the stock of the American Art Association-Anderson Galleries, Inc., the bankrupt. The latter had originally filed a petition as debtor under Chapter XI of the Bankruptcy Act for an arrangement and, while this was pending, petitioned the Referee in Bankruptcy for an order permitting (a) the sale of its furniture, fixtures, equipment and other physical assets, with certain exceptions, and, in addition (b) "the name of the debtor corporation, the right to use the same," its good will, and all rights and privileges pertaining to the good will of the business formerly conducted by the debtor, including all books, records and books of references other than books of account (R. 8-9). Certain other assets were excluded.

Parke-Bernet Galleries, Inc. paid $5,750 for the furniture, fixtures and equipment (R. 21-22) and $6,500 for the name, good will, manuscript and catalogue, etc. (R. 23-24).

The decision of the Circuit Court of Appeals does not prohibit the bankrupt from using its name in any business other than that in which it had been theretofore engaged or one similar thereto. *Mutual Life Insurance Co.* v. *Menin, et al.,* 115 F. (2d) 975, 979, marginal note.

Argument.

In the absence of bankruptcy proceedings, the petitioner, by proper corporate procedure, could have sold any of its assets, tangible or intangible, including its name and good will. *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.,* 208 U. S. 554; *U. S. Ozone Co.* v. *U. S. Ozone Co.,* 62 F. (2d) 881 (C. C. A. 7th Cir.); *The Metropolitan Telephone and Telegraph Co., et al.* v. *Metropolitan Telephone and Telegraph Co.,* 156 App. Div. 577; *Slater* v. *Slater,* 175 N. Y. 143; *Ajax Tool Co., Inc.* v. *Buchalter Tool Co., Inc.,* 125 Misc. 752.

There seems no potent or logical reason why a bankruptcy court should not have like power to dispose of all of the assets of a corporation for the benefit of creditors.

In the case of *Theobald-Jansen Electric Co.* v. *Harry I. Wood Electric Co.,* 285 Fed. 29 (C. C. A. 6th Cir.), cited by petitioner, it appeared that the order directing the sale of the bankrupt's assets included, in addition to furniture, merchandise, fixtures, etc., the good will and use of the trade-name of the business. The District Court required the Referee's order to be so limited that any sale of the trade-name was not to be treated as equivalent to and should not operate in any way to include the corporate name of the bankrupt, the bankrupt itself having objected to the use of its corporate name.

It thus appears that, whereas in the instant situation the debtor consented to the sale of its corporate name, in *Theobald-Jansen Electric Co.* v. *Harry I. Wood Electric Co.,*

285 Fed. 29, the sale was forced contrary to the wishes of the bankrupt corporation.

As to *Sawilowsky* v. *Brown,* 288 Fed. 533 (C. C. A. 5th Cir.), and *Beauchamp* v. *United States,* 76 F. (2d) 663 (C. C. A. 9th Cir.) they involved the use by an individual of his name as distinguished from a corporation. A corporation, however, is quite different. It does not need the same protection as individuals do with respect to the use of its name. A franchise granted to a corporation gives the shareholders collectively no more than the right to engage in a business. Thus, though it may have the same privilege as an individual to continue, it would logically follow that the shareholders under the corporate form could be properly forbidden from competing under its own name.

Any discussion as to what is included in a voluntary sale of a business is not pertinent to the present situation, since the sale of the bankrupt's name as part of the good will was specifically included in the order of sale.

It appears ineluctably from the record that the order confirming the sale included substantial assets affecting the good will of the bankrupt, such as certain correspondence pertaining to the good will and two restrictive covenants found in certain contracts, as well as manuscript and catalogue and a public library (R. 23).

The decision of the Circuit Court of Appeals was in direct accordance with sound legal reasoning, and no novel question of widespread interest has been presented as a reason for any review by this Court.

CONCLUSION.

Petition for writ of certiorari should be denied.

Respectfully submitted,

PARKE-BERNET GALLERIES, INC.,
By J. ARTHUR LEVE,
Counsel.